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No. 89-1897

In The

Supreme Court of the United States

OCTOBER TERM, 1989

BILLIE R. SCHLANK,
Petitioner,

v.

KATHERINE A. WILLIAMS, ACTING ADMINISTRATOR, REHABILITATION SERVICES ADMINISTRATION OF THE COMMISSION ON SOCIAL SERVICES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

HERBERT O. REID, SR.,
Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

*JAMES C. McKAY, JR.,
Assistant Corporation Counsel, D.C.

Office of the Corporation Counsel, D.C.
District Building, Room 305
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

Attorneys for Respondent

**Counsel of Record*

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals, A. 1a-27a,[1] is reported at 572 A.2d 101 (D.C. 1990).

STATEMENT OF THE CASE

Petitioner (the "vendor"), a blind person, operates a vending stand in the United States Department of State under the Randolph-Sheppard Vending Stand Act, 20 U.S.C.

[1] "A." references are to documents included in the Appendix to the Petition.

§§ 107-107f (1988).[2] She seeks reversal of a decision of the District of Columbia Court of Appeals affirming an order of the Superior Court of the District of Columbia denying her motion for attorneys fees.

The vendor filed an action in the Superior Court against the Acting Administrator of the Rehabilitative Services Administration of the Commission on Social Services of the District of Columbia Department of Human Services seeking the right to service vending machines in the State Department in areas outside her facility, to have her stand reclassified for purposes of promotion and transfer, to incorporate her business or be exempted from the business franchise tax and receive a refund of taxes paid, and to deduct legal fees as part of her operating expenses for calculating her "net proceeds."[3]

On cross-motions for summary judgment, the Superior Court held that the vendor had a right to incorporate; certified the tax issues to the court's tax division; declared invalid certain program instructions used as a basis to deny the vendor's application to service vending machines in the State Department, but left the issue of whether there were other valid reasons for denial for trial; invalidated the state agency's formula to determine the performance standard for promotion and transfer; and rejected the vendor's argument that she could deduct legal fees from net proceeds in determining her contribution to a required administrative set-aside for the benefit of all blind vendors. A. 7a-8a.

The vendor then moved for attorneys fees, but the Superior Court denied the motion. Relying on the American Rule, the court determined that the Randolph-Sheppard Act itself did

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[2] The Act is administered by the federal Rehabilitative Services Administration of the Department of Education and by the Rehabilitative Services Administration of the Commission on Social Services of the D.C. Department of Human Services, which is a "state agency" under the Act. The District of Columbia is considered a "state" for purposes of the Act. *See* 20 U.S.C. § 107e(5) (1988).

[3] The vendor also moved to maintain a class action, which motion was denied.

not provide for the award of attorneys fees, and expressly rejected the vendor's assertion that the defendants' conduct was in bad faith. A. 42a-45a. The District of Columbia Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW CORRECTLY REFUSED TO AWARD ATTORNEYS FEES UNDER THE AMERICAN RULE, SET FORTH BY THIS COURT IN *ALYESKA*, AS THE RANDOLPH-SHEPPARD ACT DOES NOT EXPRESSLY AUTHORIZE FEE SHIFTING.

Under the American Rule, set forth in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), each party bears its own litigation expenses unless the court is authorized to shift fees by an express statutory or contractual provision or under one of the three equitable exceptions to the rule—*i.e.*, where a party has preserved or recovered a common fund benefiting others, shown "willful disobedience of a court order," or "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 257-258.[4]

The vendor does not argue before this Court that the D.C. Court of Appeals erred in affirming the Superior Court's rejection of her claim that the respondent had acted in bad faith. A. 21a-22a, 43a. Nor does she argue that any of the other equitable exceptions to the American Rule apply. Instead, she relies entirely on the theory that the Randolph-Sheppard Act itself authorized an award of attorneys fees.

However, the vendor has not pointed to any provision of the Act authorizing fee shifting or cited any legislative

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[4] This Court has recently reaffirmed this decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. ____, 109 S.Ct. 2732 (1989). *See also, Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

history evidencing a congressional intent to shift fees.[5] Rather, she argues that the authority to shift fees can be implied from a legislative intent to make whole vendors injured by violations of the Act or from contractual obligations toward those vendors, as third-party beneficiaries, arising from a state's participation in the federal program. Pet. at 6. As we shall show, the decisions of this Court do not permit exceptions to the American Rule based on such reasoning.

II. THE VENDOR'S ARGUMENT THAT AN EXCEPTION TO THE AMERICAN RULE MAY BE IMPLIED FROM A LEGISLATIVE INTENT TO MAKE A PROTECTED PERSON WHOLE OR FROM CONTRACTUAL OBLIGATIONS ARISING FROM A STATE'S PARTICIPATION IN A FEDERAL PROGRAM IS CONTRARY TO THIS COURT'S DECISIONS IN *F.D. RICH, SUMMIT VALLEY*, AND *PENNHURST*.

Following the Third Circuit's decision in *Delaware Department of Health and Social Services, Division for the Visually Impaired v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), the vendor argues that the American Rule does not apply because "[t]he District of Columbia, by virtue of its participation in the Federal blind vendors program, [has] undertaken to make blind vendors whole for breach of its contractual obligations" and that " 'the blind vendors became, in effect third party beneficiaries of agreements between the participating states and the federal government.' " Pet. at 9, *quoting Delaware*, *supra*, 772 F.2d at 1127. As the D.C. Court of Appeals pointed out (A. 19a), and as we explain, *infra*, Part III, this case is distinguishable

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[5] The Act, thus, stands in stark contrast to the Acts of Congress mentioned by this Court in *Alyeska*, which contained "specific and explicit provisions for the allowance of attorneys' fees." 421 U.S. at 260.

on its facts from *Delaware*. More fundamentally, this approach is precluded by the decisions of this Court in *F.D. Rich Company v. United States ex rel. Industrial Labor Company, Inc.*, 417 U.S. 116 (1974); *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717 (1982); and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1971).

In *F.D. Rich*, this Court reversed a decision of the Ninth Circuit authorizing an award of attorneys fees to a successful litigant under the Miller Act. The Court recognized that "[t]he Miller Act is 'highly remedial [and] entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labors and materials go into public projects.' " 417 U.S. at 124, *quoting MacEnvoy & Company v. United States ex rel. Tomkins Company*, 322 U.S. 102, 107 (1944). However, the Court rejected the Ninth Circuit's theory that "in providing Miller Act claimants should recover 'sums justly due,' 40 U.S.C. § 270b(a), Congress must have intended to provide for the award of attorneys' fees because without such fee shifting, Miller Act claimants would not be fully compensated . . ." 417 U.S. at 128. The Court noted that "[t]his argument merely restates one of the oft-repeated criticisms of the American Rule." *Id.*

Likewise, in *Summit Valley*, this Court refused to construe a provision in the National Labor Relations Act entitling a person injured in violation of the Act to "damages" to permit an award of attorneys fees. 456 U.S. at 722-723. The Court, like the one in *F.D. Rich*, was not impressed by the fact that the statute was remedial in nature or that it was designed to make the injured litigant whole. As the Court noted:

> Ultimately, petitioner's argument rests on the assumption that "Congress plainly intended Section 303 [29 U.S.C. § 187(b)] to be *fully* remedial and to restore to the victimized employer *all . . . losses* caused by the illegal activity . . . ." Even assum-

> ing that attorneys fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. *F.D. Rich Co v. United States ex rel. Industrial Lumber Co.* . . .

456 U.S. at 724-725 (emphasis in original).

While the vendor attempts to distinguish these cases—*F.D. Rich* on the ground that it involved "commercial" litigation, and *Summit Valley* on the ground that it involved "a private damages action between an employer and union," Pet. at 11 n. 6—she cannot show that the principle for which they stand does not apply here. Although the Randolph-Sheppard Act is remedial and entitled to liberal construction, so are the Acts of Congress construed in these cases. This Court described the Miller Act as "highly remedial" and the National Labor Relations Act as "fully remedial."

Moreover, those Acts contain provisions expressly giving a protected injured person a private cause of action with the right to recover "sums justly due," and "damages," respectfully. *See* 40 U.S.C. § 270b(a) (1988); 29 U.S.C. § 187(b) (1988). The Randolph-Sheppard Act contains no such provision and, therefore, is even less susceptible to a construction that it provides authority to shift fees. That this Court, in light of the American Rule, refused to read a right to attorneys fees into either of these two remedial Acts, even though those Acts contained express policies to make injured parties whole and rights to compensation, strongly supports the D.C. Court of Appeals' conclusion that no similar right should be read into the Randolph-Sheppard Act.[6]

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[6] The D.C. Court of Appeals' decision finds further support in *Runyon v. McCrary*, 427 U.S. 160, 183-185 (1976), in which the Court refused to read 42 U.S.C. § 1988, as it then read, as authorizing an award of attorneys fees to parents of Black children who were excluded from admission to Virginia private schools solely on racial grounds. That the Court declined to construe this highly remedial provision of the Civil Rights Act to authorize attorneys fees argues in favor of not construing the Randolph-Sheppard Act to permit fee shifting, in the absence of express congressional direction.

Nor can fee shifting here be justified on an implied contract theory based on the District's participation in a federal-state program established by federal legislation. Under *Pennhurst State School and Hospital v. Halderman*, *supra*, a state participating in such a program cannot be deemed to have agreed to be liable for financial burdens, such as attorneys fees, unless such consequences are spelled out unambiguously in the Act establishing the program. Since the Randolph-Sheppard Act does not provide for fee shifting, this financial liability on the part of the District cannot be implied.

In *Pennhurst*, this Court reversed a circuit court decision holding that mentally retarded residents of a state facility receiving federal funds under the Developmentally Disabled Assistance and Bill of Rights Act of 1975 were entitled to "appropriate treatment" in the "least restrictive environment." The Court held:

> . . . [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power thus rests on whether the State voluntarily or knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.* By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (emphasis added). *Accord*, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Board of Education of the Hendrick Hudson Central School District Board of Education, Westchester County v. Rawley*, 458 U.S. 176, 204 n.26 (1982).

The Randolph-Sheppard Act, like the Developmentally Disabled Assistance and Bill of Rights Act of 1975, requires

participating states to enter into agreements with the federal government for the benefit of the persons protected by those Acts. *See* 20 U.S.C. § 107b (1988). Had Congress intended that a consequence of a state's participation in this program would be to expose it to civil liability for damages and attorneys fees, Congress certainly knew how to do so. The absence of any evidence of such an intent in the text or legislative history of the Randolph-Sheppard Act precludes construing the Act to permit attorneys fees, since under *Pennhurst* this Court "may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." 451 U.S. at 17.

Indeed, a majority of the Eighth Circuit in *McNabb v. United States Department of Education*, 862 F.2d 681 (8th Cir. 1988), *cert. denied,sub. nom., McNabb v. Cavazos*, ___ U.S. ___, 110 S.Ct. 55 (1989), expressly relied on *Pennhurst* in ruling that the Randolph-Sheppard Act cannot be construed to make participating states liable for compensatory damages and, *a fortiori*, attorneys fees. See 862 F.2d 685 (Fagg, J.) and 687-688 (Doty, J.). As Judge Fagg noted, "[n]either Congress, nor a court interpreting the Act, is permitted to 'surpris[e] participating [s]tates with post-acceptance . . . conditions.' " *Id.* 687 (Fagg. J., concurring and dissenting), *quoting Pennhurst, supra*, 451 U.S. at 25.

Therefore, the vendor's argument that a right to attorneys fees under the Randolph-Sheppard Act can be implied runs afoul of the decisions of this Court.

III. THE DECISIONS CITED BY THE VENDOR ARE DISTINGUISHABLE.

In addition to *Delaware*, the vendor relies on decisions of the Eighth Circuit in *McNabb v. United States Department of Education, supra*; the Fourth Circuit in *Almond v. Boyles*, 792 F.2d 451 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); and the District Court for the District of Columbia in *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F.Supp. 292 (D.D.C. 1990). These cases are all distinguishable.

A. The vendor's reliance on *McNabb* is surprising, since, as noted above, that case is directly contrary to her position. In *McNabb*, a blind vendor filed a grievance after a vending facility he sought was awarded to a vendor with less seniority. The federal arbitration panel ruled that he was entitled to the vending facility and that he had the right to request that the panel be reconvened to award him compensatory damages and attorneys fees. The Secretary of Education refused to reconvene the panel, but the district court ordered the Secretary to reconvene the panel, holding that an arbitration panel had the authority to make such awards. The Eighth Circuit affirmed the order of the district court to reconvene the panel, but did not decide the issue of the authority of an arbitration panel to award attorneys fees. Indeed, a majority of the court held that the Randolph-Sheppard Act did *not* give an injured person a right of action against a state for compensation for injuries. It only left open the possibility that attorneys fees might be assessed against the *Secretary* as a consequence of his refusal to convene a panel, but did not decide that question, leaving its resolution to the arbitration panel.

Each member of the three-judge panel wrote a separate opinion. Chief Judge Lay, the only member who believed that an arbitration panel could award compensatory damages against a state, held simply that the authority to award attorneys fees as part of compensatory damages is a question more properly decided in the first instance by the arbitration panel when it reconvenes." 862 F.2d at 685. Judge Fagg sharply disagreed with Judge Lay's statement that the Act permitted the panel to award compensatory damages against a state, *id.* at 685-696, but agreed that "the arbitration panel may determine that attorneys fees should be paid by the Secretary of Education rather than the State of Arkansas." *Id.* at 687. Judge Doty sided with Judge Fagg on this question. While stating that, "[u]nder [20 U.S.C.] § 107d-2(d) . . . the vendor should . . . be reimbursed for any costs, including reasonable attorney's fees, made necessary by the acts of the Secretary," he made it clear that

attorneys fees could not be awarded against a *state*, noting that this holding would "avoid the onerous effect on a state treasury of retroactive damages." 862 F.2d at 687. Thus, a majority of the Eighth Circuit held that the Randolph-Sheppard Act could not be construed to permit an award of compensatory damages against a state for violation of the Act. If the Act does not permit compensatory damages against a state, *a fortiori*, it does not permit an award of attorneys fees.

Furthermore, all three judges distanced themselves from the Third Circuit's holding in *Delaware*. Chief Judge Lay distinguished *Delaware* on the ground that the matter had been fully arbitrated in that case. *Id.* at 685. Both Judges Fagg and Doty directly criticized the decision on the ground that the financial burden imposed on the state simply from its participation in the blind vendor program conflicted with *Pennhurst*. *See* 862 F.2d at 686 (Fagg. J.) and 687-688 (Doty, J.). Judge Doty stated "I would not follow the holding of the Third Circuit in Delaware . . . as I believe the legal underpinnings of that case have been fatally eroded." *Id.* at 687-688. Thus, *McNabb* rejects, rather than supports, the vendor's argument.

B. The Fourth Circuit's decision in *Almond* did not address the issue at hand. In that case, blind vendors brought an action to recover "employer" and "employee" contributions, which North Carolina had wrongfully required them to pay in clear violation of the Act, which treats vendors as self-employed, independent contractors. The district court awarded plaintiffs attorneys fees, and increased the lodestar by 50 percent owing to the complexity, novelty, and contingent nature of the case. The Fourth Circuit *reversed* the district court's award, concluding that the District Court "applied the wrong standard in calculating the award [of attorneys fees]." 792 F.2d at 456. However, the issue of the authority of the district court to make the award in the first place was not before the Circuit because the defendants had not challenged the court's authority. They had merely contended that the court had "abused its discretion in the award

of attorneys' fees." *Id.* As the Superior Court noted, in distinguishing *Almond* from the case at hand, "the issue of *whether* there was statutory authority for an award of counsel fees was not contested, and therefore not decided or considered, by the Fourth Circuit." A. 44a (emphasis in original). Thus, *Almond* did not even address the issue of whether the Randolph-Sheppard Act authorized fee shifting.

C. As the D.C. Court of Appeals pointed out, the Third Circuit's decision in *Delaware* is distinguishable from this case. As the court below noted, *Delaware* relied on the "broad make-whole powers of [an] arbitration panel" under federal law, rather than the powers of a state court. A. 19a, *quoting Delaware*, *supra*, 772 F.2d at 1140.[7] Whether an arbitration panel possesses the authority to grant attorneys fees under any circumstances has been disputed. *See Georgia Department of Human Resources v. Bell*, 528 F.Supp. 17, 25 (N.D.Ga. 1981).[8] But, even assuming *arguendo* that a federal arbitration panel possesses this power, as the D.C. Court of Appeals noted, "[o]nly by analogy can the proceedings in Superior Court in this case be said to have mirrored the arbitration panel's decision in *Delaware*." A. 19a. The Superior Court does not possess the powers of a federal arbitration panel and is clearly limited by the American Rule, which is part of the common law. *See Alyeska*, *supra*, 421

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[7] Indeed, as the court in *Delaware* emphasized, 772 F.2d at 1130:

> . . . No witness in hearings on S. 2582. and no member of Congress ever suggested that the scope of relief which could be awarded in these arbitration proceedings, agreed to by virtue of a state's voluntary participation in the Randolph-Sheppard program, was in any degree different than that available in other arbitration proceedings.

[8] That court observed:

> [20 U.S.C. §] 107d-2(d) of the Act provides that "[t]he Secretary shall pay all reasonable costs of arbitration . . . in accordance with a schedule of fees and expenses he shall publish in the Federal Register." This Court finds that, by specifically directing the Secretary to pay for arbitration expenses in accordance with a schedule of fees, Congress foreclosed any action by an arbitration panel to award arbitration expenses.

U.S. at 247. Moreover, the single statutory peg on which the court in *Delaware* based its decision, 20 U.S.C. §107d2(d), which provides that "[t]he Secretary [of Education] shall pay all reasonable costs of arbitration . . .," clearly does not apply to the Superior Court. Therefore, the analogy of *Delaware* to this case is inapt.

D. Finally, the vendor relies on the decision of the District Court for the District of Columbia in *Committee of Blind Vendors of the District of Columbia v. District of Columbia, supra.* Pet at 10. However, on July 31, 1990, that court issued a memorandum decision, on defendants' motion to alter or amend the judgment, *distinguishing* this case from that before the district court:

> Admittedly, the Court of Appeals' very thorough analysis in *Schlank* gives this Court some pause. Nonetheless, in light of the very unique circumstances presented by this case, the Court distinguishes *Schlank* and reaffirms its prior conclusion that a fee award is justified. While *Schlank* involved the claims of one vendor, this case involved myriad claims by 63 blind vendors, who ultimately sought to compel the District's overall compliance with a federal program.

Committee of Blind Vendors of the District of Columbia v. District of Columbia, 1990 WL 116813 (Civ. Act. No. 88-0142-OG, D.D.C. July 31, 1990).

In any event when the district court makes an award of attorneys fees, the District of Columbia intends to appeal, and the District of Columbia Circuit will have the opportunity to express its views on the question of whether the Randolph-Sheppard Act authorizes fee-shifting.

* * *

In sum, the D.C. Court of Appeals and Superior Court of the District of Columbia correctly applied the American Rule in this case. In the absence of any express statutory or contractual provision or equitable principle authorizing fee shift-

ing, the courts below correctly refused to award attorneys fees. The vendor's arguments, if accepted, would create a new and broad exception to the American Rule under which courts could award attorneys fees by reason of a state's participation in a federal program. We submit that the vendor's argument is contrary to this Court's decisions in *Alyeska*, *F.D. Rich*, *Summit Valley*, and *Pennhurst*, and should be rejected.

CONCLUSION

The petition should be denied.

Respectfully submitted,

HERBERT O. REID, SR.,
Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

*JAMES C. MCKAY, JR.,
Assistant Corporation Counsel, D.C.

Office of the Corporation Counsel, D.C.
District Building, Room 305
1350 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

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